Editor's note: Reconsideration denied by Order dated March 20, 1992

UNITED STATES
v.
LOYALL FRAKER

IBLA 89-587 Decided January 3, 1992

Appeal from a decision of Administrative Law Judge Parlen L. McKenna declaring the Molly One millsite claim invalid. NMC-356758.

Affirmed.

1. Millsites: Generally--Mining Claims: Contests--Notice: Generally

   A Government contest of a millsite claim is not subject to dismissal for failure to name all interested parties.

2. Millsites: Determination of Validity--Millsites: Independent--Mining Claims: Millsites--Rules of Practice: Appeals: Burden of Proof

   When the Government has presented evidence that a quartz mill or reduction works is not present on a millsite, and the claimant fails to refute that evidence, the millsite does not qualify as an independent millsite pursuant to 30 U.S.C § 42 (1988).

3. Millsites: Dependent--Millsites: Determination of Validity--Mining Claims: Millsites--Rules of Practice: Appeals: Burden of Proof

   When the Government has presented evidence that a millsite is not being used or occupied for mining and milling purposes, and the claimant fails to refute that evidence, the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1988).

APPEARANCES: Loyal Fraker, Dayton, Nevada, pro se and on behalf of his son, Loyall Fraker.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Loyal Fraker has appealed from a decision by Administrative Law Judge Parlen L. McKenna, dated April 19, 1989, the Molly One millsite invalid on grounds that the millsite was not being used or occupied for mining or milling pu connection with a valid mining claim, nor does it contain a quartz mill or reduction works as required by 30 U.S.C. § 4 The Molly One claim is located in sec. 36, T. 16 N., R. 21 E., Mount Diablo Meridian, Lyon County, Nevada.

On December 22, 1987, the Bureau of Land Management (BLM) initiated contest proceedings by filing a complain that

(1) The residential occupancy of the Molly #1 Millsite, NMC-356758, is not reasonably incident to prosp mining, or processing operations (43 CFR 3712.1(a) and 30 U.S.C. 612a);

(2) The Molly #1 Millsite, NMC-356758, is not being used or occupied for mining, milling, proc beneficiation, or other use reasonably incident thereto (43 CFR 3712.1(a) and 30 U.S.C. 612a, 30 U.S.C. 42); [a

(3) The Molly #1 Millsite, NMC-356758, does not contain a quartz mill or reduction work (30 U.S.C. 42

A hearing was held before Judge McKenna on Monday, December 19, 1988. At the hearing, two geologists, Ron and Daniel Jacquet, testified on behalf of BLM. Buder testified that he examined the Molly One millsite in April, Au December of 1987 (Tr. 21-22). Buder testified that in April 1987, he observed and photographed the millsite improvements located thereon. The extent of milling equipment he found on the property was "a small metal riffle an metal containers whose purpose was not clear to me" (Tr. 26). He also observed a pick and shovel. Id.

Jacquet accompanied Buder on all three visits to the millsite (Tr. 35). In his opinion, the riffles constituted the on related equipment on the site (Tr. 36). Jacquet testified, concerning the mining claims associated with the millsite, tha he had observed a prospecting pit on one of the claims which could have required up to a month's work to construct (T On his return to the site in August, he noticed that no changes had occurred in the prospect pit since April (Tr. 38) observed no quartz mill or reduction works on the site (Tr. 39). He testified that the Molly One millsite claim w opinion, not being used for mining or milling purposes, and had not been so used at any time during Fraker's occup On cross-examination, Jacquet testified that a barn had been constructed on the millsite during Fraker's occupancy being used primarily as a tack room and hay storage for livestock (Tr. 41).

Appellant testified that he is the locator of the Molly One millsite (Tr. 43). He testified that he has had a conce the site since February of 1988, that it was not ready to use until late June or July of

that year, and that it had not been used at all (Tr. 48-51). Appellant stated that he has tested, but not produced, an from his mining claims (Tr. 49). He stated that in 1980 he conveyed his interest in the millsite to his son by inter v (Tr. 44-45, 54), and that his son was aware of the millsite contest (Tr. 45). Appellant claimed that, as beneficiary o agreement, his son was the real party in interest; therefore, the contest against him must be dismissed.

Judge McKenna concluded that appellant was the real party in interest and that the contest should not be dismissed to provide notice to the proper party. He further concluded that the Molly One millsite claim was invalid because qualify as either an independent or a dependent millsite. Judge McKenna held that although appellant contended t a reduction works which would qualify the Molly One as an independent millsite, he did not establish that the equip on site or had ever been there, or that he could perform such work.

In his statement of reasons (SOR) on appeal, Fraker alleges that: "the original complaint was its self [sic] fatally fl simply so because it was in violation of the Article Four of the same Constitution the Court itself is sworn to uphold alleges that the Administrative Law Judge has ignored his assertion that his son is the real party in interest in the co charges that the Judge has confused the identities of the two individuals by misspelling their names, and as a result read documents pertinent to his appeal, including the location notice. The spelling of the names of the two men is si not identical.

Fraker alleges that the trust agreement is "a valid quit claim cover-ing [sic] all the doners [sic] property therein

* * *," and that Judge McKenna has erroneously inferred that "this is not a legal document * * *." Appellant states t
McKenna erroneously interpreted the trust agreement by stating that appellant "reserved the right to live on and ev
Molly Mill Site One." Finally, appellant complains that Judge McKenna's decision is arbitrarily and unlawfully d

[1] Appellant seeks dismissal of BLM's contest against the validity of the millsite which he has occupied allegi
does not own the millsite and is not an interested party. He claims he has quitclaimed to his son his interest in the M
millsite claim by inter vivos trust, and that his son is the proper party to be served with notice of contest proceedin

Contrary to the argument made on appeal, it is not necessary for the Board to interpret the terms of the trust do
order to resolve this question. The date of issuance of the complaint is the critical date for determining real parties i
Prior to that date, it was BLM's obligation to search the appropriate records to obtain ownership information. Patsy A
98 IBLA 385, 389 (1987); United States v. Prowell, 52 IBLA 256 (1981). The complaint in this matter was issued
Fraker, P.O. Box 446, Dayton, Nevada 89403. In his SOR, appellant avers

that his legal name is Loyal V. Fraker; his son's name is Loyall L. Fraker. This averment is consistent with the sign
the trust agreement.

An affidavit of assessment work performed in 1985, filed as Contestant's Exhibit 11, lists both Loyal (Buck) F
Loyall Fraker as locators of the Molly One claim. The address of both locators is listed on the affidavit as Box 446
Nevada 89403. The affidavit was recorded by Loyall L. Fraker. The record establishes that the complaint was issued
Fraker, who is the party to whom appellant claims that it should have been issued. At the hearing appellant admitte
son had received actual notice of the complaint; he also waived an offered opportunity for recess to permit the young
to appear on his own behalf (Tr. 45-46, 56).

It is clear that both appellant and his son were co-locators of the claim, and both should have been named ar
Nonetheless, the record establishes that Loyal V. (Buck) Fraker has appeared in this proceeding both on his own b
on behalf of his son, Loyall L. Fraker. When he refused an opportunity to recess the hearing to permit the younger
appear, and elected to proceed to contest the complaint on the merits, appellant Loyal V. (Buck) Fracker waived a
in service, admitting that both locators had prior actual notice of the complaint. There is simply no basis for a findi
contest should be dismissed for a fatally defective procedural error.

Even if the complaint had named only Loyal V. (Buck) Fraker, under these facts, there would be no fatal procedu
Appellant occupies the Molly One claim. He admits he located the claim, and filed notices of assessment work perf
the claim. The Board in United States v. Brings, supra at 390, found that affidavits of assessment represent a ready
determine claim ownership. Evidence in the record therefore establishes that appellant is an interested party to thi
Current regulations of the Department expressly provide that a Government contest complaint is not subject to dis
failure to name all interested parties. See 43 CFR 4.451-2(b).

[2-3] Appellant also argues that Judge McKenna's decision is unconstitutional, arbitrary and capricious. These a
are not supported by the record, or by reasoned analysis. Concerning the contention by appellant that the Molly On
had a reduction works that would qualify the claim as an independent millsite, Judge McKenna found that:

> BLM introduced the testimony of Ronald R. Buder and Daniel Jacquet, two BLM geologists, who are very famili
> Mr. Fraker's mining and milling operations. They both testified, and provided photographs as proof, that, as far a
> ing and milling equipment was concerned, Mr. Fraker's millsite contained only a pick, a shovel, a couple of alu
> riffles, and one or two metal boxes. It was their opinion, based on

their years of experience with mining operations, that this minimal supply of equipment did not constitute a red
works.

(Decision at 3).

After defining the term "reduction works" to include operations where metals are separated from ore, Judge
concluded that "the minimal mining and milling equipment found on Molly One millsite does not constitute a qua
reduction works sufficient to qualify it as an independent millsite." Id. at 4.

The findings and conclusion so made are fully supported in the record. Appellant offered no contrary proof conc
existence of the alleged reduction works, and it is clear from the record that the equipment found on the claim was
the Government witnesses described it to be.

With respect to whether BLM had met its burden of proof concerning the existence of a dependent millsite on the
Judge McKenna evaluated the evidence presented by BLM as follows:

> At the hearing, BLM presented evidence showing that Loyall Fraker's associated mining claims are of little
> that Mr. Fraker has done very little mining work and has done no process-ing of mining material on Molly One M
> and that his residence, corral, and barn are not reasonably incident to his mining and milling activities. BLM esta
> a prima facie case as far as all of these issues were concerned, and Loyall Fraker bore the burden of refuting that ev
>
> Loyall Fraker admits that he has never processed any mineral material on Molly One Millsite. * * *
>
> * * * * * * *
>
> The fact that Mr. Fraker failed to present any evidence to rebut BLM's proof that his associated mining claims
> workable was fatal to his defense.

(Decision at 4-5).

We find Judge McKenna's decision that appellant has not established the Molly One to be either an indepen
dependent millsite substantiated by the evidence in the record, and accordingly adopt and affirm his findings and co
quoted above. See United States v. Swanson, 93 IBLA 1, 93 I.D. 288 (1986). Appellant has failed to esta
these findings were made in error, and has not overcome the prima facie case established by BLM by a preponderan
evidence, inasmuch as the Government evidence concerning mining equipment, occupancy, and use for mining pur
uncontested at hearing.

Appellant testified at hearing that he had been prevented from dili-gent prosecution of mining operations by poor l
malicious interference in his activity by other (Tr. 53, 55). Evaluating this evidence, Judge McKenna found that "Fra
to present any evidence to rebut BLM's proof" (Decision at 5). This finding is also supported in the record. Appella
shown that this finding was made in error, and has instead focussed his principal argument on the procedural issue p
discussed. Consequently, he has thereby failed to overcome the Government case by a preponderance of evidence,
required to do if he were to prevail on appeal. See United States v. Weekley, 86 IBLA 1 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43
the decision appealed from is affirmed.

Franklin D. Arness

Administrative Judge

I concur:

Robert W. Mullen
Administrative Judge